

REMARKS

STATUS OF CLAIMS

Claims 1, 6, 10, and 11 have been amended. Claims 2, 7, 26, and 30 are canceled. No claims have been added or withdrawn. Claims 1, 3-6, 8-11, 22-23, 25, 27-29, 31-33, 36-37, 39-40, and 42-43 are currently pending in the application.

INTERVIEW SUMMARY

Applicant's representative, the Examiner and a supervisory examiner held a telephone interview on December 7, 2006. In the interview, the parties discussed the amendment herein to claim 1 and the Shurmer reference, and Applicant advised that all independent claims would be similarly amended. Applicant's representative pointed out that Shurmer does not describe an agreement or contract as claimed and that Shurmer describes certain forms of monitoring, but not agreements or contracts as claimed. Applicant's representative also noted that Shurmer does not describe verifying that an actual level of service conforms to an agreement or contract as claimed. The parties did not reach agreement.

CLAIMS 1, 6, 10, AND 11

Claims 1, 6, 10, and 11 stand rejected under 35 U.S.C. 103 as allegedly unpatentable over Shurmer et al., Laurent and "Official Notice." The rejections are respectfully traversed.

All independent claims are amended herein, in the same form as presented in the interview, to clarify that the verifying may include providing a report of exceptions. Generally, the amendments incorporate the subject matter of claim 2, 7, 26, and 30 into a corresponding independent claim, and also use the term "exceptions" to highlight the feature of verifying conformance of an agreement or contract to actual performance. Support is in at least original claim 2 and pages 51, 52, and 55-60 of Applicants' specification. Claims 2, 7, 26, and 30 are canceled.

With the proposed amendments, all independent claims are patentable over Shurmer et al. in view of Laurent and "Official Notice."

Shurmer does not describe an **agreement** or **contract** as claimed. Shurmer 1:44-67 describes monitoring sessions, monitoring parameters, data signals, and display, but not an **agreement, contract, schema, or rules for agreements and their organization**, as claimed.

Shurmer 6:57-67, 7:1-9, 8:3-14, 14:39-48, and 16:39-43 describe various monitoring approaches and tests, but not **receiving first information defining the service level agreement** that defines the tests, as claimed. Shurmer 16:35-46 describes performing tests at certain time periods but not **receiving second information defining a service level contract** that includes apply times, as claimed. The Office Action appears to simply ignore the recited terms “agreement” and “contract.” The use of a “broadest reasonable interpretation” of a reference does not empower the Office to ignore claim terms that have plain meaning.

Shurmer does not describe **verifying that an actual level of service conforms to an agreement or contract** as claimed. Shurmer only provides service level monitoring. Shurmer’s monitoring can be useful in evaluating customer complaints (16:39-43) but there is no automatic evaluation of conformance to an agreement or contract.

The Office Action applied Zhang to former claim 2, now incorporated in claim 1. However, Zhang does not state what “analysis” means in the context of Zhang’s disclosure, and has no description or suggestion that “analysis” of test result data could involve determining exceptions with respect to an agreement or contract for a particular service level.

Recognizing the deficiencies of Shurmer in Zhang with respect to the claimed “verifying” step, which is now clarified by the amendment herein, the Office Action at page 4, 1st full paragraph, argues that “it is obvious to use the result of the test” to determine conformance. The use of the present tense verb (“it is obvious”) rather than a statement that it would have been obvious at the time of Applicants’ invention (at least as early as November, 2000) indicates the use of impermissible hindsight reconstruction of the invention. The contentions of obviousness are not based on competent **evidence** from the references or another recognized source. No evidence of **motivation** is given. Therefore, the Office Action does not present a *prima facie* case of obviousness under section 103.

Page 4, 1st full paragraph, last sentence, purports to take official notice “that it is obvious to verify” conformance of an SLA or SLC to actual network performance. The Office may not take official notice that something is obvious, which is a legal conclusion. The Office may only take official notice of **facts** under **very limited circumstances**. MPEP 2144.03. In particular, the fact for which official notice is taken must be **immediately apparent and not capable of serious dispute**. Automatic verification of actual network performance against an agreed contract was not common knowledge at the time of Applicants’

invention for all the reasons given in the Background section of Applicants' specification, and there is no evidence of record that it was. Applicants challenge the official notice and request support in fact. MPEP 2144.03.C. The use of "official notice" to substitute for the failure of the references to provide an actual teaching or suggestion of the claimed subject matter is not a permitted use of "official notice."

Page 3, point a., first paragraph, first sentence, asserts that Shurmer et al. teaches creating a schema. The last sentence says that Shurmer does not teach a schema and relies on Laurent. Page 2, point 5., does not even mention Shurmer. This is the **sixth** Office Action in the case and yet the specific grounds of rejection are continually unclear. Clarification is requested so that Applicants have a fair opportunity to reply.

Each of the other claims depends directly or indirectly on one of claims 1, 6, 10, and 11 and therefore includes each of the features of the independent claim on which it depends. Because of the differences in the independent claims that are already identified above, the dependent claims are not addressed comprehensively. However, each of the other claims adds additional subject matter that independently renders it patentable over the references.

For all these reasons, any combination of Shurmer with Laurent cannot provide the complete claimed subject matter of claims 1, 6, 10 and 11. Reconsideration is respectfully requested.

CONCLUSION

The Applicant believes that all issues raised in the Office Action have been addressed and that allowance of the pending claims is appropriate. After entry of the amendments, further examination on the merits is respectfully requested.

The Examiner is respectfully requested to contact the undersigned by telephone if it is believed that such contact would further the examination of the present application.

For the reasons set forth above, it is respectfully submitted that all of the pending claims are now in condition for allowance. Therefore, the issuance of a formal Notice of Allowance is believed next in order, and that action is most earnestly solicited.

For two (2) months and otherwise to the extent necessary to make this reply timely filed, the Applicant petitions for an extension of time under 37 C.F.R. § 1.136. The fee is submitted concurrently herewith.

If any applicable fee is missing or insufficient, throughout the pendency of this application, the Commissioner is hereby authorized to any applicable fees and to credit any overpayments to our Deposit Account No. 50-1302.

Respectfully submitted,

HICKMAN PALERMO TRUONG & BECKER LLP



Christopher J. Palermo, Reg. No. 42,056

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2055 Gateway Place, Suite 550
San Jose, California 95110-1089
Telephone: (408) 414-1202
Facsimile: (408) 414-1076